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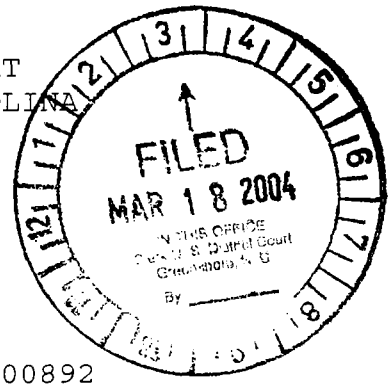


IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MICHAEL ALLEN ABEL; and JOANIE ABEL,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 1:02CV00892
CAROLINA STALITE COMPANY, Limited Partnership; and ALLEN LEE DREW,	)	
Defendants.	)	

MEMORANDUM OPINION

BULLOCK, District Judge

On October 16, 2002, Michael Allen Abel and Joanie Abel (collectively "Plaintiffs") filed this diversity action seeking compensatory and punitive damages against Carolina Stalite Company, Limited Partnership, ("Carolina Stalite") and Allen Lee Drew (collectively "Defendants"). Plaintiffs' complaint states two claims for relief against Defendant Drew on the bases of negligence and loss of consortium. Plaintiffs' complaint also states a separate claim for relief against Defendant Carolina Stalite on the basis of corporate negligence. Before the court is Defendants' motion for partial summary judgment, which includes Defendant Drew's motion for summary judgment as to Plaintiffs' claim for punitive damages against him and Defendant Carolina Stalite's motion for summary judgment as to Plaintiffs'

claims for corporate negligence and punitive damages against it. The court has reviewed the pleadings and all materials produced during discovery. For the following reasons, Defendants' motion for partial summary judgment will be denied.

FACTS

Because this matter is before the court on Defendants' motion for partial summary judgment, the court will view the evidence in a light most favorable to Plaintiffs. See Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). Defendant Carolina Stalite operates a surface mining facility in Rowan County, North Carolina, which qualifies as a mine subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("FMSHA") and administrative regulations promulgated by the Mine Safety and Health Administration ("MSHA") pursuant to the FMSHA. See generally Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984).[1] At all times relevant to this matter, Defendant Carolina Stalite employed Defendant Drew as a front end loader at its surface mining facility, and R&S Senter

[1]The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("FMSHA") generally empowers the Secretary of Labor, within the Department of Labor, "[to] develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811. Congress has authorized the Secretary of Labor to carry out his functions under the FMSHA through the Mine Safety and Health Administration. See generally 29 U.S.C. § 557a.

Trucking, Inc. ("R&S"), a Georgia-based trucking company, employed Plaintiff Michael Allen Abel as a truck driver. Plaintiffs' claims against Defendants arise out of an accident involving Plaintiff Michael Allen Abel and Defendant Drew that occurred on the premises of Defendant Carolina Stalite's surface mining facility on February 28, 2000.

On February 28, 2000, at approximately 5:00 a.m., Plaintiff Michael Allen Abel and J.R. Day, another truck driver employed by R&S, arrived at Defendant Carolina Stalite's surface mining facility to pick up two truckloads of three-quarter inch aggregate material, which is a type of loose rock used for concrete manufacturing. Day entered the surface mining facility first and parked his truck at a stockpile of three-quarter inch aggregate material ("the stockpile") so that Defendant Carolina Stalite's employees could fill his truck with aggregate material from the stockpile. Instead of following Day directly to the stockpile, Plaintiff Michael Allen Abel crossed a set of railroad tracks and parked his truck in an open space some distance away from the stockpile and completed paperwork while he waited for Defendant Carolina Stalite's employees to fill Day's truck.

On the same morning at approximately 5:15 a.m., Defendant Drew received a call on his two-way radio, which instructed him to proceed toward the stockpile and fill two R&S trucks with aggregate material from the stockpile. After receiving the call,

Defendant Drew proceeded toward the stockpile in a Caterpillar 980G Series II Wheel Loader, which weighs approximately 66,576 pounds and moves at a maximum speed of approximately 4.4 miles per hour in first gear. (Pls.' Response and Br. Opp'n Defs.' Mot. Partial Summ. J., Ex. C.) After Defendant Drew crossed over the set of railroad tracks, he collided with the back of Plaintiff Michael Allen Abel's parked truck while traveling in first gear at a speed of approximately three to four miles per hour. (Br. Supp. Defs.' Mot. Partial Summ. J. at 3; Drew Dep. at 58.) According to Defendant Drew's deposition testimony, he never saw Plaintiff Michael Allen Abel's truck until after he hit it. (Id., Drew Dep. at 62-67.)

Plaintiff Michael Allen Abel contends that the accident damaged the metal tailgate on his truck and also damaged the spill guard on the bucket of Defendant Drew's front end loader. Plaintiff Michael Allen Abel also contends that the collision caused him to strike his head on either the dashboard or windshield of his truck. (Pls.' Response and Br. Opp'n Defs.' Mot. Partial Summ. J. at 4.) According to Plaintiffs' complaint, Plaintiff Michael Allen Abel allegedly suffered several serious injuries to his back and right eye as a result of the accident and Plaintiff Joanie Abel allegedly lost consortium with Plaintiff Michael Allen Abel as a result of the accident. (See Compl. ¶¶ 12-17.)

DISCUSSION

Summary judgment must be granted when the pleadings, responses to discovery, and the record show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, summary judgment is only proper when there are no genuine issues of fact presented for trial and the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a verdict in his [or her] favor." Anderson, 477 U.S. at 257 (1986).

A federal court sitting in diversity jurisdiction is bound to construe and apply the substantive law of the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Based on the principles set forth in Erie and its progeny, the court is bound to construe and apply North Carolina law to the alleged facts of the instant case. To the extent that North Carolina law is unclear or unsettled as to the issues presented by Defendants' motion for partial summary judgment, the court must determine how the North Carolina Supreme Court would decide if confronted with similar issues today. See John S. Clark Co., Inc. v. United

Nat'l Ins. Co., No. 1:02CV00576, 2004 WL 343513, at *4 (M.D.N.C. Jan. 5, 2004)(citing City of Gastonia v. Balfour Beatty Const. Corp. Inc., 222 F. Supp. 2d 771, 773 (W.D.N.C. 2002)).

Defendant Drew contends that his motion for summary judgment should be granted as to Plaintiffs' claim for punitive damages against him because Plaintiffs have failed to prove the existence of an aggravating factor to support their claim for punitive damages. Chapter 1D of the North Carolina General Statues governs punitive damage claims and sets forth certain standards for the recovery of punitive damages in North Carolina. "Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that [either fraud, malice, or willful or wanton conduct] was present and was related to the injury for which compensatory damages were awarded[.]" N.C. Gen. Stat. § 1D-15(a). In order to prove willful or wanton conduct within the meaning of N.C. Gen. Stat. § 1D-15(a), "[a] plaintiff need only show that [the] defendant acted with 'conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." Miller v. B.H.B. Enters., Inc., 152 N.C. App. 532, 538, 568 S.E.2d 219, 224 (2002)(citing N.C. Gen. Stat. § 1D-5(7)).

In the instant case, Plaintiffs' evidence tends to show that Defendant Drew allegedly drove the front end loader, which weighed approximately 66,576 pounds, with his field of vision completely obstructed when Defendant Drew knew or should have known that two R&S trucks were somewhere in front of him. Defendant Drew's alleged actions are equivalent to driving the heavy front end loader while blindfolded. See Murray v. Wyatt, 245 N.C. 123, 128, 95 S.E.2d 541, 545 (1956)("There is little difference between backing a truck when you cannot see what is behind you and in driving forward when blindfolded.") Viewing the evidence in a light most favorable to Plaintiffs, the evidence presented is sufficient to support a finding that Defendant Drew acted with conscious and intentional disregard of and indifference to the rights and safety of others. Moreover, the evidence presented could support a finding that Defendant Drew knew or should have known of the reasonable likelihood that his actions would cause injury, damage, or other harm. Therefore, Defendant Drew's motion for summary judgment as to Plaintiffs' claim for punitive damages will be denied.

Defendant Carolina Stalite contends that its motion for summary judgment should be granted as to Plaintiffs' claim for corporate negligence against it because "[Plaintiffs have] failed to establish a prima facie case of negligence on the part of [Defendant] Carolina Stalite in the hiring, training, and/or

supervision of its employee, and/or maintaining and/or operating its equipment so as to prevent the sort of injury complained of by [Plaintiffs]." (Br. Supp. Defs.' Mot. Partial Summ. J. at 4.) Plaintiffs maintain that they have presented sufficient evidence to show that Defendant Carolina Stalite breached its duty of reasonable care owed to lawful visitors at the surface mining facility by allegedly committing violations of several mandatory health and safety regulations under the FMSHA. Specifically, Plaintiff contends that Defendant Carolina Stalite breached its duty of reasonable care by failing to implement traffic control measures, by failing to provide site-specific hazard awareness training to visitors, by failing to use adequate lighting, and by failing to adequately train its employees, all in violation of several FMSHA health and safety regulations. (Pls.' Response and Br. Opp'n Defs.' Mot. Partial Summ. J. at 17.)

Under North Carolina law, the theory of corporate negligence involves nothing more than an application of common-law negligence principles to negligence claims against a corporate defendant. See generally Blanton v. Moses H. Cone Mem'l Hosp., Inc., 319 N.C. 372, 354 S.E.2d 455 (1987). "In order to establish a prima facie case of negligence, [a] plaintiff must offer evidence that [the] defendant owed him a duty of care, that [the] defendant breached that duty, and that [the] defendant's breach was the actual and proximate cause of [the] plaintiff's

injury." Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 324-25, 291 S.E.2d 287, 289 (1982)(citing Burr v. Everhart, 246 N.C. 327, 98 S.E.2d 327 (1957)). According to the North Carolina Supreme Court, owners and occupiers of land in North Carolina owe a duty of reasonable care in the maintenance of their premises for the protection of lawful visitors. See Nelson v. Freeland, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). However, whether a party is guilty of negligence is ordinarily a question for the jury to decide and "[a] court will rule that a party was negligent, as a matter of law, only where exceptional factual circumstances exist or where the party's actions constitute 'negligence per se.'" Geiger v. Guilford Coll. Cmty. Volunteer Firemen's Ass'n, Inc., 668 F. Supp. 492, 497 (M.D.N.C. 1987).

Plaintiffs contend that Defendant Carolina Stalite's alleged violations of several FMSHA health and safety regulations are sufficient to support a finding of negligence per se. When a statute or administrative regulation imposes a duty on a person for the protection of others the North Carolina Supreme Court has held that it is a public safety statute or regulation, and a violation of such a statute or regulation is negligence per se unless the statute or regulation says otherwise. See Hart v. Ivey, 332 N.C. 299, 304, 420 S.E.2d 174, 177 (1992) (citations omitted); see also Baldwin v. GTE South, Inc., 335 N.C. 544, 547, 439 S.E.2d 108, 109 (1994)("When the violation of an

administrative regulation enacted for safety purposes is criminal, . . . that violation is negligence per se in a civil trial unless otherwise provided.")(citing Swaney v. Steel Co., 259 N.C. 531, 542, 131 S.E.2d 601, 609 (1963)). "A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant." Hart, 332 N.C. at 304, 420 S.E.2d at 177 (citing Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954)).

Congress enacted the FMSHA to protect the health and safety of miners and to authorize the development of mandatory health and safety standards in order to improve the working conditions and practices in coal and other mines. See 30 U.S.C. §§ 801-804, 811. The purpose of the FMSHA and FMSHA health and safety regulations is to protect the health and safety of miners. Westmoreland Coal Co. v. Fed. Mine Safety and Health Review Comm'n, 606 F.2d 417, 420-21 (4th Cir. 1979).[2] The court recognizes that the FMSHA health and safety regulations cited by Plaintiffs impose mandatory duties on mine operators and mine employees to protect the health and safety of miners; however, Plaintiffs do not qualify as miners and do not fall within the class of persons protected by the FMSHA and FMSHA health and

[2]According to the FMSHA, "'miner' means any individual working in a coal or other mine." 30 U.S.C. § 802(g).

safety regulations. Therefore, the court finds that Defendant's alleged violations of several FMSHA health and safety regulations do not constitute negligence per se.

Although Defendant Carolina Stalite's alleged violations of several FMSHA health and safety regulations do not constitute negligence per se, the FMSHA health and safety regulations cited by Plaintiffs do present some evidence of custom in the mining industry, and evidence of custom is generally admissible to establish the standard of care required in negligence actions. Cf. Cowan, 57 N.C. App. at 324-25, 291 S.E.2d at 289-90 (holding in a negligence action by a non-employee invitee that regulations assuring safe working conditions for employees promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. ("OSHA"), are some evidence of custom in a particular industry, even though a violation of OSHA regulations is not negligence per se under North Carolina law). Plaintiffs may be able to support their claim for corporate negligence against Defendant Carolina Stalite with evidence that Defendant Carolina Stalite allegedly violated several FMSHA health and safety regulations; however, such evidence does not establish negligence as a matter of law. Plaintiffs' evidence of Defendant Carolina Stalite's alleged violations of several FMSHA health and safety regulations is merely one factor that a jury may be able to consider and weigh along with many other factors when considering

Plaintiffs' claim against Defendant Carolina Stalite for corporate negligence. Cf. Sawyer v. Food Lion, Inc., 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001) ("[W]hile an OSHA violation is some evidence of a defendant's negligence, it is not dispositive. It is just one factor to be considered and weighed by the jury.")

Defendant Carolina Stalite contends that even if Plaintiffs' evidence of its alleged violations of several FMSHA health and safety regulations is evidence of negligence, Plaintiffs have failed to demonstrate how those alleged violations were the proximate cause of their injuries. (Defs.' Reply to Pls.' Br. Opp'n Defs.' Mot. Summ. J. at 5.) The North Carolina Supreme Court has defined proximate cause as follows:

> Proximate cause [means] 'a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.'

Adams v. Mills, 312 N.C. 181, 192-93, 322 S.E.2d 164, 172 (1984)(citing Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

Proximate cause is ordinarily a question of fact to be resolved by the jury because proximate cause is essentially an inference of fact to be drawn from all other facts. Id. "Only when the facts are all admitted and only one inference may be

drawn from them will the court declare whether an act was the proximate cause of an injury or not." Id. (citations omitted). In the instant case, reasonable minds could disagree as to whether Defendant Carolina Stalite's alleged failure to implement traffic control measures, alleged failure to provide site-specific hazard awareness training to its visitors, alleged failure to use adequate lighting, and alleged failure to adequately train its employees proximately caused Plaintiffs' alleged injuries. Therefore, Defendant Carolina Stalite's motion for summary judgment as to Plaintiffs' claim for corporate negligence will be denied.

Defendant Carolina Stalite contends that its motion for summary judgment should be granted as to Plaintiffs' claim for punitive damages against it because Plaintiffs have failed to show the existence of an aggravating factor to support their claim for punitive damages and because North Carolina law prohibits an award of punitive damages against a corporate defendant solely on the basis of vicarious liability. As stated above, Chapter 1D of the North Carolina General Statues sets standards for the recovery of punitive damages and requires a plaintiff to prove that either fraud, malice, or willful or wanton conduct was present and was related to an injury for which compensatory damages were awarded in order to recover punitive damages. See N.C. Gen. Stat. § 1D-15(a). "Under [N.C. Gen.

Stat.] § 1D-15(c), punitive damages may not be assessed against a corporation unless 'the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.'" Miller, 152 N.C. App. at 539, 568 S.E.2d at 225 (quoting N.C. Gen. Stat. §1D-15(c)).

In the instant case, Plaintiffs contend that Defendant Carolina Stalite intentionally and repetitively disregarded several FMSHA health and safety regulations and that Defendant Carolina Stalite knew or reasonably should have known that its disregard of FMSHA health and safety regulations would result in injury. (Pls.' Response and Br. Opp'n Defs.' Mot. Partial Summ. J. at 18.) Viewing the evidence in a light most favorable to Plaintiffs, the evidence is sufficient to support a finding that Defendant Carolina Stalite acted with conscious and intentional disregard of and indifference to the rights and safety of others. Moreover, the evidence presented could support a finding that Defendant Carolina Stalite knew or should have known of the reasonable likelihood that its actions would cause injury, damage, or other harm.

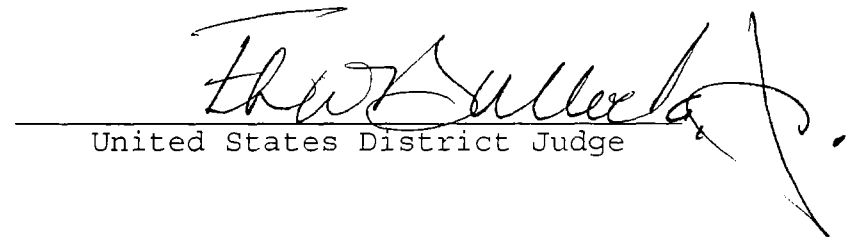
Plaintiffs also contend that Defendant Carolina Stalite renounced its duty to comply with FMSHA health and safety regulations in the past and that Defendant Carolina Stalite failed to take corrective action against Defendant Drew after the

accident involving Plaintiff Michael Allen Abel and after another accident which occurred several years earlier. Viewing the evidence in a light most favorable to Plaintiffs, a genuine issue of material fact exists as to whether Defendant Carolina Stalite's officers, directors, or managers participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages, that is, Defendant Carolina Stalite's alleged conscious and intentional disregard of and indifference to the rights and safety of others through its alleged repetitive failure to comply with FMSHA health and safety regulations. See Miller, 152 N.C. App. at 540, 568 S.E.2d at 225 ("The plain meaning of 'condone' is to 'forgive or overlook' or 'permit the continuance of.'" (internal citations omitted)). Therefore, Defendant Carolina Stalite's motion for summary judgment as to Plaintiffs' claim for punitive damages will be denied.

CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment will be denied.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.



United States District Judge

March 18, 2004